

CCASE:

MSHA V. PENN ALLEGH COAL

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FEDERAL MINE SAFETY & HEALTH REVIEW COMMISSION  
WASHINGTON, D.C.

July 15, 1982

SECRETARY OF LABOR,  
MINE SAFETY AND HEALTH  
ADMINISTRATION (MSHA)

Docket No. PITT 76X241-P  
IBMA 77-60

v.

PENN ALLEGH COAL  
COMPANY, INC.

#### DECISION

This penalty proceeding arose under section 109 of the Federal Coal Mine Health and Safety Act of 1969, 30 U.S.C. § 801 et seq. (1976) (amended 1977) ("the Coal Act"). 1/ The administrative law judge concluded that Penn Allegh Coal Company, Inc., violated 30 C.F.R. § 75.1403 and assessed a penalty of \$7,500 for that violation. We affirm the judge.

Section 75.1403 is contained in 30 C.F.R. Part 75, Subpart 0.

Part 75 sets forth mandatory safety standards for underground coal mines. Subpart 0 contains mandatory standards applicable to hoisting and haulage equipment used to transport men and materials. Section 75.1403 reiterates section 314(b) of the Coal Act and provides:

Other safeguards adequate, in the judgment of an authorized representative of the Secretary, to minimize hazards with respect to the transportation of men and materials shall be provided.

The administrative procedures by which a representative of the Secretary advises an operator of other safety devices or practices required to be provided are found in 30 C.F.R. § 75.1403-1. This section in pertinent part provides:

1/ On March 8, 1978, this case was pending before the Department of Interior's Board of Mine Operations Appeals. Accordingly, it is before the Commission for disposition. 30 U.S.C. § 961 (Supp. IV 1980). The Mine Safety and Health Administration (MSHA) has been substituted for its predecessor agency, the Mining Enforcement and Safety Administration (MESA).

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The authorized representative of the Secretary shall in writing advise the operator of a specific safeguard which is required pursuant to § 75.1403 and shall fix a time in

which the operator shall provide and thereafter maintain such safeguard. If the safeguard is not provided within the time fixed and if it is not maintained thereafter, a notice shall be issued to the operator pursuant to section 104 of the Act.

On March 5, 1973, a representative of the Secretary issued the following "notice to provide safeguards" to Penn Allegh:

The two overcasts crossing No. 2 entry where the mantrip passed under were not posted with signs to warn of the low overhead clearance in the 1st right section.

Abrupt changes in vertical clearance that present a hazard to persons riding on mobile equipment shall be eliminated where possible. Otherwise, signs, preferably luminous, shall be posted to warn of the change in clearance.

On March 1, 1975, a haulage accident occurred in Penn Allegh's mine in which a miner was fatally injured while operating a battery powered scoop in an entry. The evidence indicates that the lamp cord from the miner's battery lamp caught on a roof bolt or the roof itself. The miner was lifted out of the vehicle, and apparently squeezed between the vehicle and the roof. The normal floor to ceiling height of the entry in which the accident occurred was 48 inches. The judge found, however, that beginning 24 feet outby the site of the accident the floor of the entry gradually rose until, at the point of impact, the floor level had risen 8 inches. Two inches of the buildup occurred near the point of impact. The judge also found that beginning 10 feet outby the accident site, the roof of the entry rose 6 inches and then, one foot before the accident site, the roof dropped down 6 inches. He concluded that the 6 inch drop in the roof together with the 8 inch rise in the floor resulted in a reduction in clearance at the point of impact from the normal 48 inches to 40 inches.

The judge's findings further revealed that the 6-inch rise in the roof was caused by a cut into the roof above the normal roof line made in June 1972, and that the floor buildup resulted from slag being placed on the floor during the summer months prior to the March accident. Moreover, he found that the entry where the accident occurred was the mine's main haulage entry and was traveled daily by miners and management personnel. Although Penn Allegh's general manager testified that "everyone" knew of the reduced entry height at the point of the accident, neither reflectors nor other devices were posted to warn of the reduced height.

Immediately after the accident, MESA conducted an investigation which resulted in the issuance of the notice of violation of section 75.1403 at issue. The notice of violation stated:

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During the investigation of a fatal accident, March 1, 1975, it was observed warning lights or other approved devices were not installed along unit tractor haulage road No. 2 main entry indicating the change in overhead clearance.... [N]otice to provide safeguard No. 1 H.O.W. March 5, 1973.

In finding that the alleged violation occurred, the judge concluded that the lowering of the roof and the corresponding rise in the floor constituted an abrupt change in vertical clearance which presented a hazard to persons riding on mobile equipment, and that Penn Allegh's failure to eliminate the abrupt change or to post warning devices violated the notice to provide safeguards. The judge further found that the violation was extremely serious and that Penn Allegh was "grossly negligent" in allowing it to exist.

Penn Allegh argues that the judge erred in concluding it violated the proscriptions of the safeguard notice. The essence of its argument is that the condition for which it was cited in the notice of violation is not encompassed by the safeguard notice. Penn Allegh asserts that the notice of violation addresses only overhead clearance, whereas the notice to provide safeguards is concerned with vertical clearance. We disagree. The judge found, and Penn Allegh does not dispute, that vertical clearance is the distance between the mine floor and the mine roof. It is beyond question that changes in the roof, floor, or both affect that distance. Here 6 inches of the reduction in the floor to roof distance was directly attributable to the 6 inch change in roof height. We agree with the judge that citation of the roof condition in the notice of violation was encompassed by the reference to vertical clearance in the notice to provide safeguards.

Penn Allegh also challenges the judge's conclusion that the clearance change was "abrupt" within the meaning of the safeguard notice. We reject this semantic challenge and affirm the judge's conclusion. The judge based his conclusion upon findings that at the point of impact the roof dropped 6 inches and the floor rose 2 inches out of a total 8 inch rise, and as a result, the entry height was reduced from 48 to 40 inches within the span of a foot. The element of abruptness also existed in view of the speed at which a miner was likely to approach that change. In this regard, we note the unrefuted testimony of one of the inspectors who issued the safeguard notice that equipment like that involved in the accident travels 300 to 400 feet a minute and would traverse the 24 feet before the point of impact:in 3 or 4 seconds. Thus, we agree with the judge that the change in clearance at issue was abrupt.

Penn Allegh next disputes the judge's determination that the reduction in clearance constituted a hazard to persons riding on

mobile equipment. This argument does not warrant extended discussion. We have found that the change in clearance was abrupt. The record establishes that in travelling the entry, a miner was fatally injured at the point of the clearance change. We find that the record amply supports the judge's conclusion that the abrupt clearance change posed a hazard to miners.

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Accordingly, we conclude that the judge properly found all elements required to establish a violation of the notice to provide safeguards and, consequently, the cited standard.

Penn Allegh also takes issue with the judge's findings that it was "grossly negligent" and that the violation was extremely serious. Without engaging, as did the judge, in a quantification of degrees of negligence, we find that Penn Allegh failed to exercise that care required by the circumstances. The conditions which constituted the violation had existed for some time and were known to Penn Allegh. The evidence also establishes that the change in clearance was observable by section foremen who traveled the haulageway on a regular basis. Indeed, as we have noted, Penn Allegh's own witness stated that everyone knew about the "squeeze." Thus, we conclude that the record establishes Penn Allegh's negligence. 2/

Regarding the gravity of the violation, the notice to provide safeguards sought to eliminate the hazard posed to miners riding on mobile equipment by abrupt changes in clearance. In such a situation, should an accident occur, the resulting injury clearly could be serious, even fatal. The record establishes that the probability of such an accident occurring was heightened by the fact that the haulageway where the violation occurred was frequently traveled by management personnel and miners. Therefore, we find that the gravity of the violation was serious.

In light of our conclusions that the violation existed, Penn Allegh was negligent, and the hazard presented was serious, we find that the penalty assessed by the judge was appropriate and consistent with the statutory penalty criteria. Accordingly, the judge's decision is affirmed.

A. E. Lawson, Commissioner

2/ Although two of the Secretary's witnesses testified that they did not believe the operator was negligent, the judge was not bound by their opinion. Rather, he was required to draw his own legal conclusion based upon the evidence of record considered as a whole. In our view, that evidence establishes the company's negligence.

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